In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 150

NICOLAE MALAXA, PETITIONER

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, As Successor to the Alien Property Custodian

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The order of the Acting Director of the Office of Alien Property appears at pages 23-24 of the Petition. The court of appeals affirmed in a *per curiam* judgment without opinion (Pet. App. 17-18).

JURISDICTION

The judgment of the court of appeals was entered on March 6, 1964 (Pet. App. 17-18). The petition

for a writ of certiorari was filed on June 3, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the petitioner, admittedly a national and resident of Rumania from December 10, 1884, until June 17, 1946, was entitled, under the provisions of Section 207(b) and (c) of the International Claims Settlement Act of 1949, to a return of vested property nominally owned by a Rumanian corporation.

STATUTES AND EXECUTIVE ORDER INVOLVED

The relevant statutes and executive order appear in the Appendix, pp. 8-12, *infra*.

STATEMENT

Petitioner, a citizen and resident of Rumania during the years 1940 to 1946, filed a petition in the Court of Appeals for the District of Columbia Circuit, under Section 207(b) of the International Claims Settlement Act of 1949, as amended (22 U.S.C. 1631), seeking review of a determination of the Acting Director of the Office of Alien Property, dated January 23, 1963, which had dismissed and disallowed a claim asserted by petitioner for the return of property (approximately $90,000)[1] which had been vested in the United States.

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[1] About $85,000 was held by the Swiss Bank Corp. New York Agency, and about $5,000 was held by Brown Bros. Harriman & Co. The property was vested as property of N. Malaxa Societate Anonima, a Rumanian corporation.

The Act provides, in general, for the vesting by the President, or his designee, of "satellite" assets owned by Rumania, Bulgaria and Hungary or nationals thereof, which assets were blocked in accordance with Executive Order No. 8389, as amended (Note to 12 U.S.C. 95a). It is not disputed that the property was blocked in accordance with Executive Order 8389. Section 202(a) of the Act also provides that property "owned directly by a natural person" shall not be vested, and Section 207(b) establishes a procedure for the return of property to persons who are "other than * * * a national" of the satellite" countries under certain conditions.

The Acting Director of the Office of Alien Property dismissed the claim, reasoning that the Act prohibits the return of vested property to a Rumanian "national," that the claimant was a "national" within the definition of the Act, and that he had not lost his "national" status. The court of appeals, in a *per curiam* judgment, affirmed the order of the Acting Director.

ARGUMENT

1. Petitioner's basic contention in this Court is that blocked property nominally owned by a Rumanian corporation of which he was the sole stockholder could not be vested by the Director of the Office of Alien Property under Section 202(a) of the International Claims Settlement Act of 1949 since it was actually "owned directly by a natural person." Both the statute and Article 27 of the peace treaty with Rumania (61 Stat. 1812-1814) provide that property

owned directly by a natural person shall not be vested. The court of appeals correctly rejected petitioner's contention on the basis of its earlier decision in *Schrager-Singer* v. *Attorney General*, 271 F.2d 841 (C.A.D.C.), which held that this claim could not be raised in a Section 207(b) proceeding. No further review by this Court is warranted.

a. Sections 202(a) and 207(b) of the Act provide different procedures with distinguishable standards. The former section authorizes the *vesting* of blocked property under certain conditions —one of which is that the property not "be owned directly by a natural person." The latter provides for the *return* of vested property under certain conditions—and those conditions do not include return merely because the property had been owned by a natural person at the time of vesting. The difference was a deliberate one, and, as the court of appeals observed in *Schrager-Singer*, 271 F.2d at 844-845, "* * * Congress purposely as a matter of grace granted exemption from vesting to blocked property determined to have been owned by a national who is a natural person, and just as purposely withheld that grace with respect to the return of property already vested." Petitioner is not presently challenging the vesting of the property in 1957, nor is he seeking divestment within one year of vesting as authorized by Section 202(a) He instituted this proceeding as a "claim for the return of this vested sum under Section 207(b)" of the Act (Pet. 7). That provision does not entitle him to return of the property merely on a showing that it was owned by a natural person on the date of vesting.

b. Even if the question whether the vested property was owned directly by a natural person were material in a Section 207(b) proceeding, the decision of the Director of the Office of Alien Property on that issue would be final. Section 202(c) expressly provides that the "determination * * * that any vested property was not directly owned by a natural person at the date of vesting shall be within the sole discretion of the President or his designee [*i.e.*, the Director of the Office of Alien Property] and shall not be subject to review by any court." Since the Act makes this finding final for Section 202(a) purposes, it cannot be open to collateral attack in a Section 207(b) proceeding.

c. Finally, even if the merits of the Director's finding were open to challenge in this case, it seems clear that his determination that property owned by a Rumanian corporation was not "owned directly by a natural person" was eminently justified. The legislative history set out at pages 9-13 of the Petition, particularly the language of the House Report (Pet. 11), demonstrates unequivocally that Congress intended to permit the vesting of property owned by Bulgarian, Hungarian or Rumanian corporations, apparently irrespective of the identity of their shareholders.

2. Apart from his claim that the exception of Section 202(a) applies in a Section 207(b) proceeding, petitioner does not claim expressly that he qualified for relief under Section 207(b). It seems most clear that he did not so qualify. Petitioner was a national

of Rumania within the definition provided by the Act; for the Act incorporates the terms of Executive Order 8389, under which any person who was a Rumanian national on October 9, 1940, was classified as a Rumanian national regardless of any subsequent changes of nationality. Since petitioner was a citizen and resident of Rumania until June 1946, he could not meet the first of the two qualifications prescribed by Section 207(b) for the return of vested property—*i.e.*, he could not establish that he, the claimant, was "a person other than Bulgaria, Hungary, or Rumania, or a national thereof * * *." The rule that petitioner's status in 1940 rather than his status today is determinative of his present right to have the property returned is consistent with the rule applied in cases brought under the Trading With the Enemy Act. See *Handelsvenootschap "Norma" N.V. et al.* v. *Kennedy*, 328 F.2d 529 (C.A.D.C.), certiorari denied, June 8, 1964; *N.V. Handelsbureau La Mola* v. *Kennedy*, 299 F.2d 923 (C.A.D.C.), certiorari denied, 370 U.S. 940; *Bank Voor Handel en Scheepvaart, N.V.* v. *Kennedy*, 288 F.2d 375 (C.A.D.C.), certiorari denied, 366 U.S. 962; *Kennedy* v. *Rommel*, 301 F.2d 544 (C.A.D.C.), certiorari dismissed, 371 U.S. 882; *Kennedy* v. *Christiani-Onken*, 301 F.2d 546 (C.A.D.C.), certiorari denied, 371 U.S. 828. Nor is *Roboz* v. *Kennedy*, 219 F. Supp 892 (D.D.C.), upon which petitioner relies (Pet. 14-15), relevant here. That case involved a claimant who was found to be involuntarily in a

satellite country and who enjoyed no legal rights there. Consequently, he was held not to have qualified as a "national" of that country and was permitted to recover vested property.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solticitor General.

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JULY, 1964.

APPENDIX

STATUTE AND EXECUTIVE ORDER INVOLVED

1. The International Claims Settlement Act of 1949, as amended (22 U.S.C. 1621, 69 Stat. 562, 72 Stat. 951) provides in pertinent part:

> Sec. 202(a) (22 U.S.C. 1631a). Property owned by Bulgaria, Hungary, and Rumania or any national thereof.
>
> (a) Vesting of property; liquidation; disposition of net proceeds.
>
> In accordance with * * * article 27 of the treaty of peace with Rumania, any property which was blocked in accordance with Executive Order 8389 of April 10, 1940, as amended, and remains blocked on August 9, 1955, and which, as of September 15, 1947, was owned directly or indirectly by Bulgaria, Hungary, and Rumania or by any national thereof as defined in such Executive Order, shall vest in such officer or agency as the President may from time to time designate and shall vest when, as, and upon such terms as the President or his designee shall direct. * * * Notwithstanding the preceding provisions of this subsection, any such property determined by the President or his designee to be owned directly by a natural person shall not be vested under this subsection but shall remain blocked subject to release when, as, and upon such terms as the President or his designee may prescribe. If, at any time within one year from the date of the vesting of any property under this subsection, the President or his designee shall determine that it was directly owned at the date of vesting by

a natural person, then the President or his designee shall divest such property and restore it to its blocked status prior to vesting, subject to release when, as, and upon such terms as the President or his designee may prescribe, or if such property has been liquidated, shall divest the net proceeds thereof and carry them in blocked accounts with the Treasury, bearing no interest, in the name of the owner thereof at the date of vesting, subject to release when, as, and upon such terms as the President or his designee may prescribe.

* * * *

(c) Determination of ownership by natural person of vested property.

The determination under this section that any vested property was not directly owned by a natural person at the date of vesting shall be within the sole discretion of the President or his designee and shall not be subject to review by any court.

* * * *

Section 207 (22 U.S.C. 1631f):

* * * *

(b) Notice of claim; review of denial.

Any person who has not instituted a suit under the provisions of subsection (a) of this section may file a notice of claim under oath for the return of any property, or the net proceeds thereof, vested in a designee of the President pursuant to section 1631(a) of this title and held by such designee. Such notice of claim shall be filed with said designee and in such form and containing such particulars as said designee shall require. Said designee may return

any property so claimed, or the net proceeds thereof, whenever he shall determine—

(1) that the claimant is a person other than Bulgaria, Hungary, or Rumania, or a national thereof as defined in Executive Order 8389 of April 10, 1940, as amended; and

(2) that the claimant was the owner of such property immediately prior to its vesting, or is the successor in interest of such owners by inheritance, devise, or bequest.

Any person whose claim is finally denied in whole or in part by said designee may obtain review of such denial by filing a petition therefor in the United States Court of Appeals for the District of Columbia Circuit. Such petition for review must be filed within sixty days after the date of mailing of the final order of denial by said designee and a copy shall forthwith be transmitted to the said designee by the clerk of the court. Within forty-five days after receipt of such petition for review, or within such further time as the court may grant for good cause shown, said designee shall file an answer thereto, and shall file with the court the record of the proceedings with respect to such claim, as provided in section 2112 of Title 28. The court may enter judgment affirming the order of the designee; or, upon finding that such order is not in accordance with law or that any material findings upon which such order is based are unsupported by substantial evidence, may enter judgment modifying or setting aside the order in whole or in part, and (1) directing a return of all or part of the property claimed, or (2) remanding the claim for further administrative proceedings

thereon. If a notice of claim is filed under this subsection, the property which is the subject of such claim, or, if liquidated, the net proceeds thereof, shall be retained in the custody of said designee until any final order of said designee or any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied, or until a final order of said designee or a final judgment or decree shall be entered against the claimant, or the claim or suit otherwise terminated.

(c) Exclusiveness of relief.

The sole relief and remedy of any person having any claim to any property vested pursuant to section 1631a (a) of this title shall be that provided by the terms of subsection (a) or (b) of this section, and in the event of the liquidation by sale or otherwise of such property, shall be limited to and enforced against the net proceeds received therefrom and held by the designee of the President. The claim of any person based on his ownership of shares of stock or other proprietary interest in a corporation which was the owner of property at the date of vesting thereof under section 1631a(a) of this title shall be allowable under subsection (a) or (b) of this section if 25 per centum or more of the outstanding capital stock or other proprietary interest in the corporation was owned at such date by nationals of countries other than Bulgaria, Hungary, Rumania, Germany, or Japan. But no such claim of a national of a foreign country shall be satisfied except after certification by the Department of State that the country of the na-

tional accords protection to nationals of the United States in similar types of cases.

2. Executive Order 8389, as amended (12 U.S.C. 95a, note) provides in pertinent part:

SECTION 3. FOREIGN COUNTRIES AFFECTED; EFFECTIVE DATE OF PROHIBITIONS

The term "foreign country designated in this Order" means a foreign country included in the following schedule, and the term "effective date of this Order" means with respect to any such foreign country, or any national thereof, the date specified in the following schedule:

* * * *

(e) October 9, 1940—
Rumania;

* * * *

SECTION 5. DEFINITIONS

* * * *

E. The term "national" shall include,

(i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order,

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